

EXHIBIT C

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 EFG BANK AG, CAYMAN BRANCH, et
5 al.,

6 Plaintiffs, New York, N.Y.

7 v. 17 Civ. 4767(JMF)

8 AXA EQUITABLE LIFE INSURANCE
9 CO.,

10 Defendant.

11 -----x Conference

12 June 13, 2018
13 2:20 p.m.

14 Before:

15 HON. JESSE M. FURMAN,

16 District Judge

17 APPEARANCES

18 ORRICK, HERRINGTON & SUTCLIFFE, LLP
19 Attorneys for Plaintiffs
20 BY: DARREN S. TESHIMA

21 SUSMAN GODFREY, LLP (via telephone)
22 Attorneys for Plaintiff Brach Family Foundation
23 BY: ROHIT NATH

24 MILBANK TWEED HADLEY & McCLOY LLP
25 Attorneys for Defendant
BY: STACEY J. RAPPAPORT
ANDREA G. HOOD

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your names
3 for the record.

4 MR. TESHIMA: Good afternoon, your Honor. Darren
5 Teshima, Orrick, Herrington & Sutcliffe, on behalf plaintiffs
6 EFG Bank and Wells Fargo Bank as securities intermediary.

7 THE COURT: Good afternoon.

8 MS. RAPPAPORT: Good afternoon, your Honor. Stacey
9 Rappaport. With me is my colleague Andrea Hood, Milbank Tweed,
10 Hadley & McCloy, LLP, for defendant AXA Equitable Insurance
11 Company.

12 THE COURT: Good afternoon to you, as well.

13 And my understanding is Mr. Nath is on the line as
14 well, is that right?

15 MR. NATH: Yes, your Honor. Good afternoon. Mr. Nath
16 is on the line.

17 THE COURT: I would remind those in the room to just
18 speak into the microphone. It is all the more important
19 because Mr. Nath is listening in by telephone.

20 So I must say I'm a little frustrated that you guys
21 are back in need of further assistance. I had hoped and
22 thought even that I charted a path at the May 8 conference that
23 would allow you to essentially figure out the particulars, that
24 is to say, that would enable AXA to get what it feels it needs
25 to defend this case without imposing an undue burden on the

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1 plaintiffs, but it seems to me that something went awry and
2 that obviously didn't happen.

3 The problem I have is that I am at a severe
4 disadvantage here. I was hoping that by articulating the sort
5 of broad principles and making a proposal for how to proceed at
6 the last conference, that you guys would be able to sort of do
7 the dirty work and get into the weeds, whatever metaphor you
8 want to use, and actually figure out what it meant as applied
9 to the particular documents. The disadvantage I have is that I
10 am not familiar with what those actual documents are, and so,
11 you know, it is hard for me to get into the particulars. Maybe
12 we need to get even further and you need to submit more
13 particularized descriptions of what we are talking about for me
14 to understand it. But hopefully we can put an end to all of
15 this today and avoid the need for that.

16 It does seem to me, and I obviously could be wrong
17 about this, it is sometimes hard to tell, but both sides bear
18 some of the blame for the impasse here; but, to be candid, I
19 think much of the blame lies with the plaintiffs here. It does
20 seem to me from what I have reviewed that their positions have
21 been something of a moving target, that there were
22 representations made to me at the May 8 conference, for
23 instance, with respect to whether they have documents with
24 mortality assumptions and the like that have since been
25 changed. And it strikes me that some of the production has

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1 been somewhat slow, most notably with respect to the Swiss
2 documents, that I don't understand why it took -- and I presume
3 that they have now been produced, but why it took until my
4 order setting a deadline for their production for that to
5 occur, given that I had denied the protective order and denied
6 a motion for reconsideration of the protective order. So it
7 strikes me that plaintiffs were dragging their feet somewhat at
8 least on that front, if not more broadly.

9 It is also not lost on me that these issues don't seem
10 to have presented themselves in the other cases within the AXA
11 litigation. Maybe there are separate reasons specific to this
12 case that would explain that; but, in any event, it certainly
13 contributes to my sense that there is something going on here.

14 So again, I assume that the Swiss document issues are
15 now moot. I very much hope that you are not going to tell me
16 otherwise.

17 Proceeding on that assumption, I think there are three
18 other issues that were raised in AXA's most recent letters, two
19 of which I think can sort of go hand in hand. Before I get
20 into them, is there anything that you were supposed to be
21 continuing your discussions on these issues in light of the
22 adjournment of the conference from last week? I don't know if
23 you made any progress or if there is anything to update me
24 about, but do you want to start there, Ms. Rappaport?

25 MS. RAPPAPORT: Yes, your Honor.

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1 Your Honor, we sought to meet and confer with
2 plaintiffs. We had a meet-and-confer with them on Friday
3 afternoon. We had scheduled that. Two hours before that
4 meet-and-confer, they presented us with 20 documents that they
5 thought might be important to help resolve the dispute. We
6 informed plaintiffs that we could not review those 20 documents
7 in such a short time before the meet-and-confer, but we would
8 be prepared to go ahead with it anyway. Plaintiffs suggested
9 that we adjourn until Monday the meet-and-confer.

10 We reviewed the documents over the weekend and in
11 informed plaintiffs on Monday that we did not believe that the
12 documents that they produced at all resolved the dispute. Some
13 of those documents, it is not even clear that they relate to
14 AULII. I have a small sample in case the court would like to
15 review some of them. But the dispute was not resolved.

16 We sought from plaintiffs an explanation as to why
17 they did not believe, given our submission to your Honor on May
18 25, that we were entitled to the mortality and valuation
19 documents that we sought, particularly given their
20 representations in prior meet-and-confers that they did not
21 have mortality assumptions, and plaintiffs either could not or
22 would not talk to us about why they thought the analysis that
23 we presented to the court was an appropriate manner in which to
24 proceed for us to analyze their mortality assumptions and
25 attempt to derive them from a broader set of documents.

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1 Late last night, at about midnight, Mr. Teshima sent
2 us two more documents, requesting that we review them and let
3 him know whether we would reconsider our request. Those
4 documents were similarly insufficient to ameliorate our
5 concerns. So, regrettably, your Honor, we are still at
6 impasse.

7 THE COURT: Did the meet-and-confer actually happen at
8 some point?

9 MS. RAPPAPORT: The meet-and-confer happened on Monday
10 afternoon.

11 THE COURT: Mr. Teshima.

12 MR. TESHIMA: Thank you, your Honor.

13 First of all, there have been meet-and-confer efforts,
14 as Ms. Rappaport describes, and I think the real impasse, your
15 Honor, is a misunderstanding of the terms that we are using. I
16 know this was discussed a bit at the conference in front of
17 your Honor a few weeks ago, and that has to do with the
18 mortality and valuation documents, as Ms. Rappaport just
19 described.

20 We have told your Honor and we told plaintiffs that
21 the plaintiffs, as the plaintiffs' investors, we don't perform
22 the valuation -- excuse me, the mortality assumptions that AXA
23 did as a life insurance company. Instead, they pointed to
24 these individual life expectancy reports which your Honor
25 correctly recognized might be potentially relevant if there was

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1 an extrapolation to be done to find those mortality
2 assumptions. But you asked why they couldn't just skip the
3 mortality, the extrapolation step and go to the mortality
4 assumptions.

5 The documents that Ms. Rappaport has referenced were
6 our attempts to identify for the defendant documents which we
7 believe, frankly, moot any of this extrapolation step at all.
8 The documents that I did provide late last night are EFG
9 documents that discuss mortality assumptions that they had
10 prepared for them by a third party that they believe identifies
11 the mortality base table, the 2008 VBT. So there are these
12 documents.

13 Now, the reason we did not have those prior to the
14 conference with your Honor in April was because these are among
15 the documents that were in Switzerland that we did produce on
16 June 8 and complies with your Honor's order. And if I might
17 just address that issue about the documents in a moment from
18 Switzerland, I would appreciate that.

19 But just to wrap up the meet-and-confer, we have gone
20 through an effort to identify in our production exemplar
21 documents for AXA to demonstrate that, to the extent they
22 believe they need mortality -- quote, mortality valuations from
23 the plaintiffs -- and we, again, dispute that that's relevant
24 to a reasonableness assessment of their cost of insurance
25 increase in September 2015; but, nevertheless, we have tried to

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1 identify to moot this issue. They have persisted, and I think
2 the reason is because they wish to have the individual life
3 expectancy reports which your Honor recognized at the last
4 hearing are not really relevant to this analysis of the
5 reasonableness of their mortality assumption which was based on
6 actual to expected performance over tens of thousands, if not
7 hundreds of thousands, of policyholders.

8 THE COURT: Okay. So, again, I think the devil may be
9 in the details. To take AXA's letter of May 25 as our sort of
10 guide here, in particular I am looking at Exhibit D to that
11 letter, which is AXA's attempt to sort of explain to me how
12 they would propose to use the sort of policy level data or
13 documents, if I can call it that, to extrapolate the mortality
14 assumptions and mortality tables that plaintiffs used, I guess
15 what I am struggling with, it strikes me, and I certainly hear,
16 Mr. Teshima, that you may think otherwise, but I rejected that
17 argument at the May 8 conference. It seems to me that the
18 information AXA is seeking at the end of the paragraph
19 described as step two, namely, seeking to derive what mortality
20 assumptions and mortality tables were used by the plaintiffs in
21 evaluating these insurance policies, that they are entitled to
22 that, full stop.

23 So the question to me is how to get it, and that's,
24 again, where the rubber hits the road, the devil is in the
25 details, whatever metaphor or cliché you want to use here.

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1 I was hoping that, based on our conference in May, you
2 would figure out essentially what documents you could produce
3 that would provide them with that information without
4 necessarily requiring you to produce policy level documents
5 which I agree, on their face and in a vacuum, are not
6 necessarily relevant and raise privacy issues and raise burden
7 issues.

8 But it seems to me what you are telling me is that you
9 think you have actually done that and what they are telling me
10 is that you haven't; and short of looking at the documents and
11 hearing argument about it, I don't know how I'm meant to
12 resolve that. And if I agree with them, I think ultimately you
13 have given me no choice but to say that they are entitled to
14 all of the documents they are seeking at the policy level as
15 well. I just don't know what to do here. It seems you are
16 talking past each other, and that's where I am at a
17 disadvantage.

18 MR. TESHIMA: May I respond briefly, your Honor?

19 THE COURT: Sure.

20 MR. TESHIMA: Thank you.

21 THE COURT: Let me say one last thing, which is, that
22 I find it a little hard to believe, I mean, correct me if I am
23 wrong, I'm not an expert in these matters, but it strikes me
24 that you all purchased these policies as investments and, in
25 doing so, obviously made a calculus and made a determination

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1 that it was a wise and sound investment, which presumably means
2 that you made a determination that essentially the likely
3 payout exceeded whatever the costs that you were going to
4 incur, i.e., the costs of insurance were.

5 It strikes me that, if that assumption is correct --
6 and it has to be, I would imagine -- there is some evaluation
7 or analysis that was conducted with respect to the mortality
8 assumptions or risks than underlay the pricing of the policy.
9 If that is the case, it strikes me that there have to be
10 documents that go to the heart of what they are seeking and
11 that I think they are entitled to.

12 So that's what I am puzzling over and trying to figure
13 out.

14 MR. TESHIMA: Thank you.

15 THE COURT: Now you may respond.

16 MR. TESHIMA: Thank you, your Honor.

17 Your Honor, I think you are right that the parties are
18 speaking past each other, in this sense. I would say there are
19 two buckets of documents we are speak about. First, there are
20 industry mortality tables that then base these mortality
assumptions that AXA has used for its 2015 cost of insurance
case. And then there are the individual life expectancy
reports as to any particular policyholder, and your Honor is
correct that it would make sense that, in evaluating the value
or investment value of an individual life insurance policy, you

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would look at the individual life expectancy for that individual, applying some industry standard mortality assumptions, to get an expected value or return on that individual policy for that individual policyholder and his or her health conditions, age, etc., other characteristics.

That tells you nothing about the reasonableness of a mortality assumption that AXA, again, used in creating its cost of insurance increase in 2015, again, using its actual to expected information over hundreds of thousands of policyholders. So even if it is by chance that one individual policyholder today, those mortality assumptions line up somehow to be the same as the mortality assumptions used by AXA in 2015, that still doesn't tell you anything about the reasonableness or unreasonableness of their cost of insurance increase based on what they claimed was adverse mortality experience.

So, your Honor, when you have these two buckets, we, EFG, have committed to your Honor and told the plaintiffs -- excuse me told AXA, the defendants, that we would produce these mortality assumption information to the extent we have them. And as we have now learned in our production from Switzerland, we have such documents. They are performed by third parties. Those are among the documents I provided to counsel last night. We are committed to producing those. My partner Mr. LaQuang committed to your Honor at the last hearing that those

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1 mortality assumption documents, we have no problem, we are
2 going to produce them.

3 THE COURT: Why have they not already been produced?

4 MR. TESHIMA: Your Honor, to the extent they exist for
5 EAA plaintiffs, the documents not in Switzerland, we believe
6 they have been produced. They are among the documents that --
7 the 20 documents that Ms. Rappaport referenced. We have a
8 disagreement among the parties about whether there is or isn't
9 mortality assumptions and, frankly, your Honor, I think that is
10 not because of what we have produced but, frankly, AXA's view
11 of what it wants to see. We did not perform a life insurance
12 mortality assumption analysis that this life insurance company
13 did when it performed its cost of insurance increase.

14 But on the EFG documents, your Honor, if I might just
15 touch on these from Switzerland for a moment, we did just
16 produce those in response to your Honor's order directing us to
17 do so. I do want to make clear, your Honor, that EFG was
18 attempting to comply both with your Honor's orders -- we
19 understand the motions for reconsideration had been denied. It
20 also, as you know, was very concerned about potential criminal
21 liability under Swiss law, Article 271, concurrent with your
22 Honor's order to make the production. On June 8 we received
23 guidance from an opinion from the Ministry of Justice from the
24 Swiss authorities saying that in their opinion it would not be
25 a violation to comply with your Honor's order, subject to

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1 certain redactions under Swiss privacy law, which we have done,
2 and we have informed the plaintiffs that we have now received
3 an opinion from our Swiss counsel that we may unredact those
4 documents without running afoul of the Swiss privacy law. So
5 we are going to complete that.

6 So that's why, your Honor, it took so long. We were
7 not feet-dragging, with all due respect. We were trying to
8 both comply with your Honor's orders, considering options in
9 light of those orders procedurally, but then also doing all we
10 could to address the issue with the Swiss authorities. We
11 heard back from the Swiss authorities. They had said, Had you
12 gone through the Hague Convention, there would be no need for
13 redactions, there would have been no need for this at all. But
14 they understood, because AXA did not want to go through the
15 Hague Convention, we had to make this waiver application, which
16 they then deemed unnecessary given the situation here.

17 THE COURT: All right. It might have been helpful to
18 know all of that before you briefed the motion here, but that's
19 neither here nor there at this point.

20 So are you representing to me that to the extent that
21 you have in your possession documents that fall within
22 essentially the category of documents that would be responsive,
23 if I can use that term here, to the sort of second part of the
24 step two paragraph of Exhibit D, that you have and/or will very
25 shortly turn those over?

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1 MR. TESHIMA: Yes, your Honor. We have produced this
2 baseline mortality table. We have produced information about
3 mortality assumptions. So we have done it. My understanding
4 is -- I identified a couple of examples for Ms. Rappaport. I
5 don't know that those are all the documents. Those are just
6 examples in the -- I believe over 4700 documents we produced on
7 Friday. We do not have, obviously, individual assumptions
8 regarding individual life expectancy reports, which is very
9 different, but these mortality assumptions, which I think they
10 are trying to solve for, to the extent they exist in our
11 production -- and we have provided two examples -- they have
12 been produced.

13 THE COURT: Okay.

14 Ms. Rappaport, tell me why that doesn't suffice. At
15 least it may be that there are some additional documents that
16 need to be turned over; but, when push comes to shove, I can't
17 make them turn over documents that don't exist. It sounds like
18 they are making a representation that that is ultimately what
19 lies at the heart of your step two, which is what I think you
20 are entitled to in the abstract. I don't think you are
21 entitled to the policy level life expectancy calculations or
22 assumptions, and it strikes me that you are entitled to the
23 aggregate ones that they are using; and if they represent that
24 they have given those to you, why doesn't that suffice, at
25 least for now, subject, of course, to your right to come back

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1 to me if, after deposing someone, you find out that there is
2 more to it than that or what have you?

3 MS. RAPPAPORT: So, your Honor, obviously we have not
4 been through the 4700 documents that plaintiffs produced only
5 on Friday, but the 20 examples that they provided to us as ones
6 that they thought we should look at as well as the two last
7 night do not do the job. Just five examples that I can point
8 to, your Honor -- and I have copies here today if your Honor
9 would like to take a look at them --

10 THE COURT: Sure.

11 MS. RAPPAPORT: Your Honor, may I approach?

12 THE COURT: You may. You can give them to my deputy.
13 I assume you have copies for Mr. Teshima.

14 MS. RAPPAPORT: Yes.

15 Your Honor, again, these are five examples that
16 plaintiffs -- of the 20 that plaintiffs suggested we look at on
17 Friday. They do not include the two documents that were
18 produced last evening, which I can address separately. I would
19 also note for the record, your Honor, that these documents are
20 marked confidential pursuant to the protective order in this
21 case, and I would be happy to work with Mr. Teshima subsequent
22 to the conference in order to discuss with them how to
23 appropriately get them in the record here because they are
24 marked confidential.

25 THE COURT: All right. We will probably take you up

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1 on that, but let's table that for a moment and tell me why
2 these --

3 MS. RAPPAPORT: So, your Honor, tab 1 of these
4 documents is some agreed-upon procedures that appear to be part
5 of an independent accountant report. The report mentions the
6 term "mortality" on a single page. That's page 1. It is 1B.
7 It says "mortality tracking." And this is only in the context
8 of tracking whether or not an insured person is deceased or his
9 or her address changed. There is nothing in this document that
10 refers at all to mortality assumptions and the document does
11 not even mention AULII.

12 If I can move on to tab 2, this is a document that
13 mentions mortality, but only in the context of whether
14 churchgoers generally have better mortality than
15 nonchurchgoers; and while this is responsive to our request,
16 because it has some relevance to mortality rates, it tells us
17 nothing about the specific mortality assumptions that
18 plaintiffs used, considered, or relied upon for their block of
19 AULII policies, and it doesn't even mention AULII.

20 THE COURT: What is this document?

21 MS. RAPPAPORT: Your Honor, this is the way in which
22 it was produced to us. This is one of the documents that
23 plaintiffs pointed us to in the context of the meet-and-confer
24 process.

25 THE COURT: Okay.

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1 MS. RAPPAPORT: Tab 3, your Honor, is demographic
2 information for a certain pool or portfolio policies as of
3 2003. That's before AULII was even sold. So not clear how
4 this relates at all to AULII. The only mortality-related
5 reference in this document is that smokers have twice the
6 mortality of nonsmokers and people who practice religion have
7 30 percent lower mortality, again, some relevance to general
8 mortality rates, but nothing about mortality assumptions
9 applicable to AULII. It doesn't mention AULII. And, again, as
10 I said, it was -- precedes the issuance of AULII.

11 THE COURT: I think I'm going to increase my synagogue
12 attendance, though. All right.

13 MS. RAPPAPORT: Tab 4, your Honor, is an Excel
14 spreadsheet. It is described as a service or settlement report
15 for Charity 1 Funding LLC. It reports about mortality rate
16 experience but doesn't indicate anything about assumptions
17 about future mortality, nor does it indicate that it is related
18 to AULII.

19 And the last document that we provided as a sample --

20 THE COURT: Let me interrupt you for a moment because
21 maybe there is something I am misunderstanding, but why would
22 the documents that, again, for lack of a better way of putting
23 it, would be responsive to your step 2 paragraph, why would we
24 expect them to be specific to AULII as opposed to just
25 generally being mortality-related assumptions or tables that

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1 then they could apply to an AULII policy?

2 MS. RAPPAPORT: So because the mortality assumptions
3 that plaintiffs -- that plaintiff would be applying would be
4 relevant to a particular group of insureds and a particular
5 insurer. It wouldn't -- the broader mortality documents are
6 not necessarily applicable to AULII. Indeed, the life
7 expectancy reports that -- or the two that plaintiffs produced
8 to us specifically identify the insurer and relate specifically
9 to AULII pool.

10 THE COURT: Okay. Tab 5?

11 MS. RAPPAPORT: Tab 5 is -- it discusses plaintiffs'
12 use of an industry standard table and certain adjustments made
13 to that table for the Charity funding portfolio. This document
14 is dated February 1, 2016, which is subsequent to the COI
15 adjustment announcement, so not even clear that it relates to
16 any mortality assumptions that would have applied during the
17 period when AXA was making its determination to change its
18 mortality assumptions -- change its COI. I'm sorry, your
19 Honor.

20 With respect to the documents that were produced last
21 evening, your Honor, and I can hand up copies of those as
22 well. . .

23 (Pause)

24 MS. RAPPAPORT: With respect to the document that's
25 Bates stamped EFG 16865 through 16871, this document purports

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1 to show how EFG might have valued their in-force book of life
2 settled policies, and it tells us what base table they were
3 using. But it's at a particular point in time. We don't know
4 if this relates to AULII. It doesn't tell us how EFG viewed
5 mortality at the time the policies were purchased. It doesn't
6 tell us whether the policies they are valuing using this method
7 includes AXA policies. And although it might reference a base
8 table that they were relying on, the 2008 VBT, it doesn't tell
9 us anything about the multipliers, scalers, or any adjustments
10 they were making to that base table. And so, your Honor, from
11 these documents, without -- the life expectancy reports are
12 not -- those were the documents that plaintiffs were using to
13 value their policies. These are documents that are separate in
14 their files and may have general discussions about mortality
15 tables, but they are not the specific documents that plaintiffs
16 were using or relying on when determining what mortality
17 assumptions should be applied to AULII policies, and that's
18 what we seek to derive from the life expectancy reports and
19 underlying valuation documents that accompanied those.

20 In the second document which is Bates stamped EFG
21 16872 to 16886, again, this provides information about the base
22 table and adjustments that they are making to that or suggested
23 adjustments, as this is a report that, as I read it, suggests
24 potential changes to how they should be looking at their
25 policies, not how they are actually looking at them. It

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1 doesn't tell us how plaintiff viewed mortality at the time the
2 policies were purchased, and it is doesn't tell us whether the
3 policies they are valuing in this document or discussing in
4 this document even include AXA policies. So even if we have
5 plaintiffs' base table and adjustments to them, we still need
6 the underlying documents, including the life expectancy reports
7 and medical records and mortality analyses of those individual
8 policies to do an appropriate apples-to-apples comparison to
9 the assumptions that AXA was applying to its AULII policies and
10 the assumptions that plaintiffs were applying either because
11 they generated them themselves or they relied upon assumptions
12 that were incorporated in life expectancy or other valuation
13 documents in order to do an appropriate comparison and make
14 this apples-to-apples comparison. So we need to understand how
15 plaintiffs determined what underwriting class or class of
16 health their insureds fell into so that AXA can extrapolate and
17 compare information as to how AXA would have evaluated that
18 insured and compare one set of mortality assumptions to
19 another.

20 So, again, your Honor, these are the examples that
21 plaintiffs pointed us to or a handful of them, and they are
22 simply not adequate for us to perform the analysis that is set
23 forth in our exhibit to our May 25 letter.

24 THE COURT: How many policies are we talking about?

25 MS. RAPPAPORT: 107 policies across all plaintiffs in

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1 the EFG action.

2 THE COURT: And why, going back to something that I
3 had proposed at the last conference, why wouldn't some sort of
4 sampling approach be an acceptable compromise that would
5 minimize the intrusion on privacy and the burdens on the
6 plaintiff but allow you to essentially extrapolate from a
7 representative sample whatever data you can extrapolate?

8 MS. RAPPAPORT: First, your Honor, with respect to the
9 burden, the arguments that were made by plaintiffs at the
10 conference before your Honor were subsequently modified in
11 meet-and-confers and as explained to us the burden is quite
12 minimal with respect to providing these documents.

13 Plaintiffs have told us they would have to review 200
14 documents per policy, not saying how many they think would be
15 produced. But if they reviewed 200 documents per policy and
16 they have said that many of those policy files contain
17 documents that apply across policies, it would likely be a lot
18 less than 200 per policy that they would have to review. So I
19 don't think that there is a burden issue here.

20 But on the assumptions side, they are not providing us
21 with the assumptions that underlie those life expectancy and
22 valuation reports. These are a hodgepodge of documents
23 contained in their files about mortality tables that they may
24 be applying to certain policies without the application of any
25 particular scalers. We don't know if these apply to AULII

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1 policies, and a sampling is just not workable in that respect.

2 THE COURT: Mr. Teshima, back to you. You can tell
3 me, what is the burden here? How many documents are we talking
4 about? Do you agree there are 107 policies and how many
5 documents would you have to review per policy?

6 MR. TESHIMA: Your Honor, we do agree to the number of
7 policies. The burden argument that Ms. Rappaport referenced
8 are the fact that there are some overlapping documents within
9 each policy which then would shorten down the list from
10 approximately 3,000 documents down to perhaps 2 or 300
11 individual documents for each policy.

12 The issue and burden here, your Honor, is that we are
13 going up against the shifting request, so we are asked to
14 provide samples. We spend multiple hours of time by our team
15 to find these examples. We produce the examples to the
16 plaintiff. Rather than respond and say they are insufficient,
17 they filed a letter brief with your Honor saying, We can't do
18 this. Sampling has proved unworkable. Nothing they are going
19 to give us is going to satisfy us that sampling works.

20 So, your Honor, in AXA's letters to the court, they
21 said sampling is not going to work. So, instead, we are left
22 with this burden of trying to find documents that will never
23 satisfy AXA. When we provide the mortality assumptions, as
24 they asked for in step 2, as read in the example that
25 Ms. Rappaport handed up to your Honor, we talk about the 2008

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valuation basic table that we use as a mortality table. We tell them that we use them. It says it was used by plaintiffs. They say, well, that's not good enough, because it is not what you used at the time of acquisition. Well, that was back in 2007. So why would they need that to help them understand the reasonableness of their cost of insurance rate in 2015? And then they say it's not good enough because it doesn't reference the particular policies. Well, I'm confused because I thought they were trying to revert back and extrapolate to a general aggregate mortality base table and any adjustments we have made in assessing these policies. That's what we have done. We have produced it. And now they say that's not enough. We need the individual mortality assumptions. We need all the health information to make this assessment.

And, your Honor, respectfully, this methodology that they have crafted is not going to help the trier of fact understand the reasonableness of their cost of insurance increase at all. It is undisputed. These extrapolated mortality assumptions they are trying to create, they weren't used by my client. They weren't used by AXA at the time. They are just saying, We are going to redo this and come up with a new number, and we will reference to what we did in 2015 and see if it is reasonable. That's not going to help the trier of fact understand whether or not AXA complied with its policies and based its cost of insurance increase based on increased

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1 mortality that it actually experienced.

2 So we would say, your Honor, the sampling, we would
3 agree with plaintiffs it is not going -- defendant, excuse me,
4 is not going to work, and also it is going to lead to
5 irrelevant information. So it's both burdensome and not
6 probative of the issues here.

7 THE COURT: Well, your view is that giving them any
8 policy level information or documents would be not helpful to
9 the trier of fact, I take it. My question is why not split the
10 difference and say, fine, defendants pick 25 policies and you
11 will provide all responsive documents with respect to those
12 policies? What's the problem with that approach? It kicks the
13 can down the road a little bit, perhaps, whether this stuff
14 ultimately is admissible, relevant, helpful, but it allows them
15 to do whatever analyses they think they can do from it and it
16 at least gets us past this impasse.

17 MR. TESHIMA: Your Honor, the issue is that we would
18 have to undertake this burden whether it is 200 documents per
19 policy, 3,000 documents per policy, to look to see or frankly
20 to demonstrate to AXA that what they are asking for doesn't
21 exist, it was never relevant. Having us do that just to try to
22 satisfy AXA that what they are looking for isn't relevant is an
23 undue burden to us and disproportional again to the needs of
24 this case. This is not, at the end of the day, going -- the
25 decision about whether -- and the determination of whether

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1 AXA's cost of insurance increase was reasonable or not is not
2 going to turn on some extrapolation from individual
3 policyholders' life expectancy reports that may have taken
4 place, as Ms. Rappaport acknowledged, well before or after the
5 cost of insurance increase.

6 THE COURT: And the first five documents that
7 Ms. Rappaport presented to me do seem rather far afield from
8 what we are supposed to be getting at here, but last two strike
9 me as much closer to the step two paragraph that I have been
10 focusing on.

11 Can you represent that everything similar to this has
12 been produced?

13 MR. TESHIMA: Your Honor, we have not completed our
14 close secondary review of the documents. We produced the
15 documents to meet the court's deadline. These are documents
16 that we pulled using the same search terms, so I assume that
17 the search terms hit and selected these documents. They would
18 produce the others. And the reason why the first five may not
19 be exactly what plaintiff -- the defendant is looking for is
20 that these are the EAA documents; and recall that, for the EAA
21 policies, these were acquired through West LB subsequent to the
22 foreclosure of that bank. There wasn't an individual valuation
23 done. This was an acquisition of a portfolio of the life
24 insurance policy. So we have done our best to provide some
25 documentation that describes mortality. The answer is there

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1 may not be this answer for the EAA trust. There are already
2 these documents for EFG. We have produced them. The two
3 examples that your Honor has looked at today demonstrate that
4 we are producing documents that go to this aggregate mortality
5 assumption.

6 If, at the end of the day, they complete their review
7 of the documents we have produced and they say, These are the
8 only two, we are happy to come back, talk about search terms
9 again, but I suspect these are not the only two. We were able
10 to quickly find these as examples to bring to Ms. Rappaport's
11 attention prior to the hearing.

12 THE COURT: All right. We have to begin to wrap this,
13 up but Ms. Rappaport?

14 MS. RAPPAPORT: First, your Honor, there have not been
15 agreed upon search terms as plaintiff well knows because we
16 sent them a lengthy letter. They have narrowed their search
17 terms based on the narrow scope that they sought to collect
18 without regard for the present dispute. So I am not at all
19 agreeing that the scope of what they have even collected and
20 reviewed so far is at all adequate.

21 But I think what plaintiffs -- the important thing
22 that plaintiffs have told you today is that there is no
23 meaningful burden. AXA has produced probably 80,000 documents
24 by this point and reviewed many hundreds of thousands more and,
25 given that there are \$560 million in face value in these

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1 policies and these are financial institutions that are suing
2 AXA, there is no reason why they cannot review these documents.
3 There is no burden, disproportionate burden here that
4 plaintiffs would suffer.

5 The second point is, your Honor, this case is about
6 the reasonableness of AXA's mortality assumptions, and clearly
7 the mortality assumptions that were incorporated in documents
8 that plaintiffs relied upon, considered, or developed in
9 connection with the acquisition of an interest in these
10 policies is extremely relevant to whether AXA's mortality
11 assumptions were at all comparable so that we can make an
12 argument as to whether these were reasonable in light of what
13 plaintiffs were looking at. This is not a sampling exercise,
14 your Honor, that plaintiffs are implying that we are taking on
15 because -- or that we are saying is insufficient because we
16 feel like going on these discovery disputes. But, your Honor,
17 it was based on a representation or at least an understanding
18 that I had and I believe that the court had at the last
19 conference that we were going to get the mortality assumptions
20 that underlie each of those life expectancy reports. That's
21 not what these documents are. These are documents about
22 mortality and about mortality tables that reside in plaintiffs'
23 files, but these are not the mortality tables and assumptions
24 that are underlying the reports that plaintiffs have produced
25 to us with respect to the AULII policies; and without those

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1 mortality assumptions, we cannot perform this exercise of
2 determining what the broader set of mortality assumptions that
3 plaintiffs were using with respect to these AULII policies, and
4 that's why we need a broader set of policy documents, so that
5 we can derive what we believe were the assumptions that
6 plaintiffs are relying on and we can compare them to those of
7 AXA and make an argument that AXA's assumptions were more than
8 reasonable.

9 THE COURT: All right. I think I have heard enough at
10 least for now. I'm not sure this is going to ultimately
11 satisfy anybody, but here is where I think we are:

12 I am not persuaded that AXA should get the policy
13 level documents. At the end of the day, I think what is
14 clearly, in my view, relevant and to which AXA is entitled is
15 essentially again what is at the heart of the step two
16 paragraph in Exhibit D of the May 25 letter.

17 What I hear is that plaintiffs are producing or have
18 produced anything that sort of falls within that category, and
19 that ultimately I think is what AXA is entitled to. The policy
20 level documents and data strike me as a roundabout way of
21 getting there, and ultimately strike me as not proportional to
22 the needs of the case, not only because I think there is a
23 burden but, when push comes to shove, I think really it is
24 several steps removed from what is at the heart of this case,
25 namely, the reasonableness of AXA's assumptions. I think to

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1 the extent that there are parallel assumptions in the custody,
2 control, or possession of the plaintiffs, that AXA is entitled
3 to them. But I don't think that the -- at least right now I
4 don't think that the policy level sort of expectancy
5 calculations made with respect to an individual insured
6 ultimately are probative enough of that issue to warrant
7 disclosure at that level.

8 It sounds to me like (a) the plaintiffs may not have
9 produced everything that would fall within the scope of the
10 broader category and (b) defendants haven't yet gone through
11 everything that has been produced. It may be that the
12 plaintiffs haven't actually fulfilled their obligations in that
13 regard. That, to me, is a different question and strikes me as
14 a different problem than whether they should be required to
15 produce the policy level documents and information. Again, I
16 think requiring them to do that is a roundabout way of ensuring
17 that they have complied with their obligations to do what I
18 think that they need to do, which is, produce the aggregate
19 level assumptions that went into whatever decisions they made.

20 All of which is to say, I'm not going to require the
21 plaintiffs to produce the policy level documents at this time.
22 I think they should continue to go through whatever they have
23 and ensure that they have produced anything that could
24 conceivably fall within the broader aggregate level category.
25 Defendants should review whatever has been produced and

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1 obviously when it comes time for depositions, I think questions
2 can be asked of the folks who handled these things for the
3 plaintiffs about whether there are any other sorts of documents
4 and/or what sorts of assumptions were made as applies to
5 individual policies and the like. If it turns out that there
6 are materials that were not produced that should have been
7 produced, then the plaintiffs are going to have to answer to
8 that.

9 But at the end of the day, I think that requiring them
10 to produce the individual policy level documents is really not
11 an appropriate way to get at what AXA is ultimately entitled to
12 and may well already have.

13 I think that presumably answers or may answer the
14 entitlement to interrogatories 5, 7, and 9 as well. I am happy
15 to engage in a separate colloquy regarding that if you think it
16 doesn't, but I would think, again, to me, that the relevance of
17 who engaged in an analysis of the actuarial particulars of an
18 individual insured isn't necessarily relevant, but to the
19 extent that somebody would have engaged in that analysis at the
20 aggregate level, I think that clearly is relevant.

21 Ms. Rappaport.

22 MS. RAPPAPORT: Your Honor, just to clarify, to the
23 extent that the plaintiffs relied upon reports from third-party
24 consultants, vendors, just third parties that provided them
25 with life expectancy reports and those vendors, consultants,

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1 advisors, whoever they may be, used aggregate mortality
2 assumptions and aggregate information in assessing the life
3 expectancy of a particular individual or in coming up with a
4 mortality assumption in that particular report, it is our view
5 that we should be able to seek that information. Because
6 plaintiffs are saying it is not in their possession, aggregate
7 information may be in the possession of other outside
8 consultants and advisors who did provide that information to
9 the plaintiff, and we believe, for that reason, we should be
10 able to get the identity of those consultants.

11 Even one of the documents, your Honor, that I handed
12 up to you today is from a company called Maple Life Analytics.
13 That would be something that would fall within the category, I
14 think, of our interrogatories, but plaintiffs have refused to
15 identify them to us, even though they believe they are
16 producing documents that were provided to them from this
17 company. So this is what we are seeking so we can see what the
18 aggregate mortality assumptions that were incorporated in the
19 documents that were provided to plaintiff actually were.
20 Plaintiffs don't have that information. We should be able to
21 get that elsewhere.

22 THE COURT: If I understand you correctly, I agree. I
23 think if hypothetically they outsourced the analysis to some
24 third party that basically took mortality tables or assumptions
25 and applied those to a particular policy and then came back and

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1 said this is a good policy to invest in because we think it is
2 underpriced or what have you, I would think that you are
3 entitled to know what those assumptions and tables were even if
4 they are not necessarily in the custody of the plaintiffs. But
5 how that works in practice, whether you need to serve a
6 third-party subpoena or they would be in the custody and
7 control of the plaintiffs, I don't know. Again, this is
8 getting further into the weeds than I think I can get at the
9 moment.

10 MS. RAPPAPORT: Your Honor, we would certainly like to
11 subpoena these entities, but plaintiffs are not -- have refused
12 to answer the interrogatories where we have sought the identity
13 of those entities or individuals, which is why we,
14 unfortunately, had to come back to your Honor to request
15 further relief. So we would request that your Honor require
16 plaintiffs to respond to interrogatories 5, 7 and 9.

17 MR. TESHIMA: Your Honor, may I respond briefly?

18 THE COURT: Briefly, yes.

19 MR. TESHIMA: Your Honor, interrogatories 5, 7, and 9,
20 as written today, not only go to the individual life expectancy
21 information that your Honor has just denied their request for,
22 it also says "all individuals." It's over broad. As we have
23 stated, if defendant wants to reframe their interrogatories in
24 light of the court's order today, we are happy to consider it.
25 It is not that we are not disclosing the information. I just

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1 produced a document that shows Maple Life Analytics. That's
2 now a group, a vendor we have demonstrated that we relied upon.
3 I don't know that I would agree that if they did anything that
4 never showed up or was given to our client that our clients
5 relied upon it is somehow relevant, but if AXA wants to reframe
6 their interrogatories to narrow the focus based on the court's
7 order today, we will consider it and meet and confer with them
8 on how to respond.

9 THE COURT: Okay. I hate to keep this going, but it
10 strikes me that that might be the way to go here and have you
11 guys try and resolve this in the next couple of days on the
12 theory that this has hopefully given you even more of a path to
13 a solution. But I'm also trying not to be naive about it and
14 don't necessarily want you here next week again.

15 Ms. Rappaport.

16 MS. RAPPAPORT: Your Honor, I don't know what further
17 narrowing could be done. Interrogatory 7 seeks the identity of
18 individuals or entities who performed any actuarial or
19 financial analyses for the policies. I don't know why the
20 identity of those individuals or entities cannot be disclosed.

21 Interrogatory No. 9 seeks the identity of employees of
22 plaintiff or consultants or service providers who conducted
23 mortality or life expectancy analyses for older-age insureds or
24 provided such analyses to the plaintiffs. If they did those
25 life expectancy analyses, they clearly had aggregate mortality

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1 assumptions that they were using. That's referenced even in
2 the document that I handed up, your Honor, on page 16876. That
3 vendor said, "While life expectancies are provided for
4 individuals, they are developed from expected patterns of
5 mortality of large groups of similar individuals." That is the
6 kind of information we would be seeking from these third
7 parties, or if there are individuals at the plaintiffs that
8 have that, we would be seeking that from them, too. So I'm not
9 sure what further narrowing need be done.

10 The other interrogatory, number five, seeks the
11 identity of individuals who reviewed any policy prior to
12 plaintiff's acquisition; and, again, I'm not at all clear why
13 that is something that plaintiffs won't provide to us, because
14 those individuals were clearly involved in determining whether
15 that was a good purchase or investment for plaintiff based on
16 largely whether the mortality -- the policies were underpriced
17 or not, and that is definitely a function of the mortality
18 assumptions that were being applied at the time.

19 THE COURT: All right. Mr. Teshima, why is that wrong
20 and why would it be hard to answer these?

21 MR. TESHIMA: So, first, your Honor, on Interrogatory
22 5, the last one that Ms. Rappaport addressed, it is a separate
23 issue here. We have responded. We said that for EFG we were
24 unable to identify anybody, but we were continuing to evaluate
25 them. This acquisition happened over a decade ago. Based on

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1 our investigation to date, we have not been able to identify
2 people that would be responsive to this request. If it turns
3 out in these new documents we learn something new, we will
4 update our responses.

5 For Wells Fargo and the EAA plaintiffs, our response
6 was "none." We are not aware of anyone that was involved in
7 reviewing these policies prior to acquisition, again, for the
8 reasons described on how the EAA acquired these portfolio
9 loans, that is after the foreclosure of West LP, and given
10 Wells Fargo's role as a securities intermediary and as trustee.

11 As to the other requests, 7 and 9, Ms. Rappaport
12 referenced some of the language in these interrogatories, but
13 there is a difference, and I think this really goes to the
14 heart of the matter that we were discussing earlier, the
15 difference between mortality assumptions and valuation. Yes,
16 as investors, our clients did individualized valuations about
17 individual policies based on life expectancy. That valuation
18 information, that interest margin, expected rate of return,
19 those are going to be totally different and distinct from
20 mortality assumptions. These requests that they want to be
21 modified and focus on the aggregate level mortality assumptions
22 that we have been discussing today, those are very different
23 requests than as worded here.

24 Interrogatory 7 says "all individuals who performed
25 any actuarial or financial analysis relating to any policy."

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1 Interrogatory 9 says "identify," and it lists a number of
2 people, "including all vendors who conducted, supervised, or
3 reviewed any analysis concerning the mortality or life
4 expectancy of individuals aged 65 or older." Much broader than
5 the scope of documents that your Honor has agreed is relevant
6 here, which is the aggregate mortality assumptions. We don't
7 dispute that that's what your Honor has said is relevant. We
8 agreed. That's why we have produced these documents that we
9 have discussed today.

10 THE COURT: All right. The problem is I think that
11 Ms. Rappaport is right that the folks who engaged in those
12 kinds of analyses had to do so using some sort of assumptions
13 or tables that relate to what we are talking about, namely,
14 mortality assumptions or mortality tables. So I'm persuaded
15 that they are entitled to these. You are to respond to these
16 three interrogatories promptly. You can discuss what that
17 means with each other. But I'm persuaded that that is the way
18 to go on that.

19 The last item raised by AXA is the e-mail issues, the
20 Wells Fargo e-mail issues. As far as I'm concerned I put that
21 to rest at the May 8 conference at page 30 of the transcript.
22 I indicated that I would not take any action on that front at
23 this point, that is, that I would allow plaintiffs to rely on
24 what was in the FileNet system and their sort of document
25 retention policies and approach to make their productions, with

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1 the caveat -- and a rather big caveat -- that if, based on
2 depositions or otherwise, the defendants gave me any reason to
3 believe that relevant and responsive documents had not been
4 produced in that manner, that I would revisit the issue and
5 perhaps even impose sanctions.

6 So given that, quite frankly, I think the plaintiffs
7 proceed at their peril by relying entirely on their FileNet
8 protocols. I don't know what "substantive" means either,
9 but -- and it doesn't seem to me that we are talking about a
10 large number of custodians, and it sounds as if the plaintiffs
11 have already reviewed some of the custodians records enough to
12 know, for example, that three of the eight or so that we are
13 talking about don't have any responsive documents. So I think
14 if I were sitting where the plaintiffs are sitting, and hearing
15 also that I have lost a little bit of patience, I would
16 probably err on the side of doing a more thorough review,
17 rather than relying solely on the FileNet system.

18 But the bottom line is, I did rule and address that at
19 the May 8 conference, and I see no base or reason to revisit it
20 at this time.

21 So, Ms. Rappaport, did you want to say something on
22 that score?

23 MS. RAPPAPORT: Not on that score, your Honor.

24 THE COURT: Okay. Is there something else you want to
25 say?

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1 MS. RAPPAPORT: Yes. Given that discovery is
2 proceeding and we are -- we have a tight schedule, would your
3 Honor consider providing a deadline for the plaintiffs to
4 respond to our interrogatories so we can issue appropriate
5 subpoenas, if necessary.

6 THE COURT: Sure. How about a week from Friday?

7 MS. RAPPAPORT: That's okay with me, your Honor.

8 THE COURT: All right. Mr. Teshima?

9 MR. TESHIMA: That deadline is fine, your Honor, but
10 may I just clarify the record that we have an order to respond
11 to the interrogatories as drafted. We will do so. But am I
12 correct that the scope of that response is, again, limited to
13 the type of -- the individuals who performed the type of or
14 relied upon the type of aggregate mortality assumptions we
15 described today and not any individual anywhere who may have
16 performed an individual valuation of an individual policy using
17 an individual's life expectancy report?

18 THE COURT: No, because the point is that those
19 individuals undoubtedly, in doing that, used some sort of
20 aggregate level assumptions or tables to make those
21 determinations and calculations; and, regardless, I'm giving
22 defendant an opportunity to at least determine if in fact they
23 did or didn't, and that may ultimately get to the heart of the
24 issue.

25 So, no, I am not limiting them beyond or in any way,

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1 and you are to respond by a week from Friday.

2 The last issue I just want to mention as a
3 housekeeping one, I have been reviewing -- and Mr. Nath should
4 be listening up here, because this relates more broadly -- I
5 have been reviewing your monthly submissions with respect to
6 discovery matters, and I'm hoping that the mere exercise of
7 requiring you to make those submissions is helping you work
8 through some issues.

9 Having said that, I trust that if there is anything
10 for which you need judicial involvement or intervention, that
11 you would raise that by way of a letter motion, as the parties
12 did here, and/or you would flag it in a way more prominent way
13 than simply including it on a 45-page chart. So that is to
14 say, I'm skimming those and keeping abreast of things, but you
15 should be jumping up and down a little more than you have if
16 there is something that requires my involvement.

17 All right?

18 MS. RAPPAPORT: Yes, your Honor.

19 MR. TESHIMA: Thank you, your Honor.

20 THE COURT: Anything, Mr. Nath? Anything you want to
21 say or raise or are you good?

22 MR. NATH: No, your Honor. Thank you.

23 THE COURT: All right. Very good. In that case we
24 are adjourned.

25 I'm hoping that this puts an end to this matter, but I

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1 recognize it may not.

2 Thank you.

3 MS. RAPPAPORT: Thank you, your Honor.

4 MR. TESHIMA: Thank you, your Honor.

5 THE COURT: Oh, one last thing. I said we would take
6 up the sealing question later. Why don't you meet and confer
7 about that and let me know within a week how you propose to
8 deal with that. I do think that these should be made part of
9 the public record in some fashion since obviously I did rely on
10 them in making my rulings today. I don't think that any
11 personal identifying information, not that there was any on
12 these, should be revealed; but, otherwise, I think you have a
13 sense of where I stand on those issues, so give me your
14 thoughts within a week.

15 Thank you.

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